

## REMARKS

The applicants' attorneys thank Examiner Smith for speaking to the applicants' representative over the telephone regarding the application.

The application was finally rejected on November 2, 2004.

An appeal brief dated March 31, 2005, was filed in response to the final rejection.

No Examiner's Answer was filed in response to the brief.

In an Office Action dated July 25, 2005, the finality of the rejection was withdrawn. However, no new reference was cited. Rather, the Office Action stated that the "finality of the Office Action mailed 11/2/04 is withdrawn to correctly indicate the reliance on Wolf". By withdrawing the final rejection the appeal was terminated.

The appellate rules do not allow for terminating an appeal and re-opening the prosecution based on references that are already in the file.

According to the prior appellate practice the prosecution could be re-opened to assert new grounds.

However, according to the present rules of appellate practice, the new grounds, if any, can be asserted in the Examiner's Answer. "An examiner's answer may include a new ground of rejection." 37 C.F.R. §41.39(a)(2).

As set forth in the Federal Register, Rule 41.39(a)(2) was added in order to reduce pendency:

Thus, the revision would improve the quality of examiner's answers and reduce pendency by providing for the inclusion of the new ground of rejection in an examiner's answer without having to reopen prosecution. By permitting examiners to include a new ground of rejection in an examiner's answer, newly presented arguments can now be addressed by a new ground of rejection in the examiner's answer when appropriate. Furthermore, if new arguments can now be addressed by the examiner by incorporating a new ground of rejection in the examine's answer, the new arguments may be able to be addressed without reopening prosecution and thereby decreasing pendency.

See Federal Register, Vol. 69, No. 155, Thursday, August 12, 2004, Rules and Regulations, at page 49963.

It appears that in the Office Action, the Examiner has also provided some counter-arguments to the arguments in the appeal brief. It is respectfully submitted that the proper procedure to assert counter-arguments is to file an Examiner's Answer. There is no appellate procedure for re-opening the prosecution in order to assert counter-arguments in Ex Parte proceedings. The counter-arguments should be directed to the Board, not the applicants. It is respectfully suggested that any counter-arguments to the arguments in the appeal brief should be included in the Examiner's Answer.

It is respectfully submitted that the appeal should be reinstated because: a) there was no proper reason for terminating the appeal in the first place; b) reopening the prosecution is inconsistent with the current appellate rules which are intended to decrease the pendency of cases.

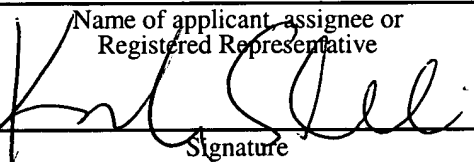
Accordingly, the reinstatement of the appeal is requested.

According to a suggestion from Examiner Smith a copy of the appeal brief that is already in the record is attached. The appeal brief has not been modified in that no new grounds appear to have been asserted.

I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as First Class Mail in an envelope addressed to: Mail Stop Amendment, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, on November 18, 2005

Kourosh Salehi

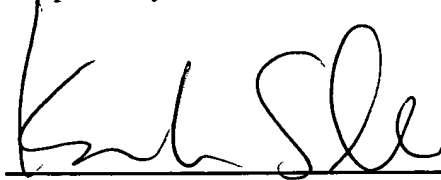
Name of applicant, assignee or  
Registered Representative

  
Signature

November 18, 2005

Date of Signature

Respectfully submitted,



Kourosh Salehi

Registration No.: 43,898

OSTROLENK, FABER, GERB & SOFFEN, LLP

1180 Avenue of the Americas

New York, New York 10036-8403

Telephone: (212) 382-0700

KS:gl